

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Section 68.4(a) of the Commission's)	WT Docket No. 01-309
Rules Governing Hearing)	
Aid-Compatible Telephones)	
)	
SunCom Wireless, Inc. Petition for Waiver of)	
Section 20.19(c)(2)(i) of the Commission's)	
Rules)	

To: The Commission

**SUNCOM WIRELESS, INC.
PETITION FOR WAIVER OF SECTION 20.19(c)(2)(i)
OF THE COMMISSION'S RULES**

Pursuant to Sections 1.3 and 1.925 of the Commission's rules, SunCom Wireless, Inc. ("SunCom") hereby requests a waiver of Section 20.19(c)(2)(i) of the Commission's rules, which was promulgated to implement the Hearing Aid Compatibility ("HAC") Act. 1/ Specifically, Section 20.19(c)(2)(i) requires each public mobile service carrier to make available to its subscribers, by September 16, 2005, two handset models per air interface that satisfy a "U3" radio frequency interference rating. 2/ Because U3-rated, dual-mode, GSM handsets are not yet commercially available to SunCom from its vendors, SunCom seeks a waiver of the rules, such that, for each of the two HAC-compliant handsets SunCom is required to offer its customers, SunCom will have 60 days beyond the date on which a manufacturer commences production on handset units for SunCom, assuming that the actual production time does not exceed six weeks. If the Commission declines to grant this relief, SunCom requests, in the alternative, that it be granted a waiver of 120 days from September 16, 2005 to come into compliance with the rule.

1/ Hearing Aid Compatibility Act of 1988, Pub. L. 100-394, § 3(a), 102 Stat. 976 (1988) (codified at 47 U.S.C. § 610(b)(1)(B)).

2/ The rating, now also known as "M3," is defined in the ANSI standard C63.19.

Background

In the continental United States, SunCom operates a wireless network predominantly covering North and South Carolina, with some areas of coverage in the bordering states of Virginia, Tennessee and Georgia. In addition, SunCom late last year commenced operations in Puerto Rico and the U.S. Virgin Islands. SunCom has completed the GSM overbuild of its previously TDMA-only network and it now offers only GSM handsets to its subscribers. ^{3/}

SunCom relies primarily on PCS spectrum in the 1900 MHz band, although in one market it also serves subscribers on cellular spectrum in the 850 MHz band. Moreover, when outside SunCom's coverage area, many customers take advantage of SunCom's roaming agreement with Cingular Wireless ("Cingular"), a carrier which relies heavily on cellular band spectrum. ^{4/} Thus, SunCom offers only dual-band phones so that its subscribers will have the best possible coverage on its own network, as well as that of its primary roaming partner. Accordingly, SunCom plans to satisfy its FCC HAC obligations exclusively through the offering of dual-band GSM handsets. In the recent *GSM Waiver Order*, the Commission recognized the importance of ensuring that hearing aid users have the same quality and extent of wireless service coverage as other subscribers, ^{5/} which would not be the case if dual-band GSM carriers offered only single-band HAC-compliant handsets.

I. No HAC-Compliant, Dual-Band GSM Handsets Are Commercially Available to SunCom

SunCom applauds the Commission for adopting the *GSM Waiver Order* which, until August 1, 2006, deems dual-band GSM handsets to be compliant with the FCC's HAC rules if they satisfy a U3 rating with reference to the 1900 MHz band only. Recognizing the technological

^{3/} Pursuant to Section 20.19(c)(2)(i)(B), carriers planning to complete the overbuilding of their TDMA networks by September 18, 2006 are not required to offer HAC-compliant TDMA handsets.

^{4/} In some markets, Cingular relies exclusively on cellular spectrum. See Cingular Wireless LLC Petition for Waiver of Section 20.19(c)(3)(i)(A) of the Commission's Rules, WT Docket No. 01-309 (filed Aug. 5, 2005) ("Cingular Waiver Request") at 21.

^{5/} See Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Memorandum Opinion and Order, FCC 05-166, (rel. Sept. 8, 2005) ("*GSM Waiver Order*" or "*Order*") at ¶¶ 9-10.

challenge in achieving compliance with the C63.19 standard for the GSM air interface in the 850 MHz band, the *Order* will undoubtedly speed the availability of HAC-compatible GSM handsets. To the best of SunCom’s knowledge, prior to the *Order*’s release on September 8 – just eight days prior to the September 16 compliance deadline – there were no existing HAC-compliant dual-band GSM handsets that had even obtained FCC/TCB equipment certifications, much less any that were “commercially available.” ^{6/} In addition to SunCom’s phone calls and e-mails to its equipment vendors (discussed below) to inquire about HAC-compatible handsets, SunCom’s counsel recently scoured the FCC’s equipment authorization database but could locate no dual-mode GSM handset equipment certifications bearing the “HC” code for HAC-compliance, except for two certifications just issued to Nokia on September 9. ^{7/} Other carriers have also indicated, prior to the release of the *Order*, that no such compliant handsets were available. ^{8/}

SunCom recognizes that the likely effect of the *Order* was to convert – overnight – a number of formerly non-compliant handsets into compliant handsets. ^{9/} Therefore, shortly after the

^{6/} Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, Report and Order, 18 FCC Rcd 16753 (2003) (“*HAC Order*”) at ¶ 65 (requiring manufacturers to make HAC-compliant handsets “commercially available”). The *HAC Order* did not define “commercially available,” nor could SunCom locate instructive precedent in analogous contexts where this term was used. SunCom notes that Samsung has proposed that “commercially available” be interpreted to mean that “a manufacturer must offer to service providers a handset model TCB-certified as compliant that is ready to manufacture if and when the service provider signs a purchase order.” Samsung Telecommunications America, L.P., Request for Waiver of Section 20.19(c)(1)(i) of the Commission’s Rules, WT Docket No. 01-309 (filed Sept. 2, 2005) (“*Samsung Waiver Request*”) at 6. However, this definition places no obligation on the manufacturer to complete the production and ship handsets to the carrier within any given time period. Thus, the manufacturer would have fulfilled its obligation without the carrier obtaining any inventory.

^{7/} A search was conducted by selecting “HC” as a “Grant Note” criteria on the FCC’s Equipment Authorization System Generic Search page. The search returned a significant number of HAC-compliant CDMA handsets, in addition to the two lone dual-band GSM handsets from Nokia, model numbers 6101(h) and 6102(h) (FCC ID numbers PPIRM-77XH and PPIRM-77H, respectively). The two models appear to be very similar, sharing the same user guide.

^{8/} See Cingular Waiver Request at 1; Dobson Communications Corp. Petition for Waiver of Section 20.19(c)(2)(i) of the Commission’s Rules, WT Docket No. 01-309 (filed Sept. 8, 2005) (“*Dobson Waiver Request*”) at 1.

^{9/} However, the existing equipment certifications are not updated to reflect the change created by the *Order*. Moreover, there may be a delay as some manufacturers rush to obtain certifications for

release of the *Order*, SunCom began re-contacting its vendors to determine if any compliant handsets are now available. As detailed below, despite aggressive effort in the past few days since the release of the *Order*, SunCom has not yet received definitive responses from several of its vendors.

However, even if SunCom successfully locates vendors with compliant handsets, that does not mean that the handsets are “commercially available” or that they can expeditiously reach SunCom’s retail locations. For a better perspective, it is helpful to first consider the *typical* timeline required for SunCom to introduce a new handset:

- SunCom internally reviews information on handsets being offered by the various manufacturers and selects models to be compatibility tested on its network (8 weeks)
- SunCom requests FCC-authorized sample units from the manufacturer for testing and waits for the units to arrive (4-8 weeks) [10/](#)
- SunCom conducts compatibility testing with the handset to ensure that all features will function properly on SunCom’s network under various scenarios (6-8 weeks)
- Upon successful completion of testing, SunCom provides a purchase order to the manufacturer
- Manufacturer commences production of the handsets ordered by SunCom and ships them to SunCom’s warehouse (4-6 weeks) [11/](#)
- SunCom distributes handsets to its retail locations (1 week)

As illustrated above, a normal new handset deployment process can take six to seven months. This standard lead time was not taken into account by the Commission in the *HAC Order*, which established the same compliance deadline for both manufacturers and carriers. Thus, under some interpretations of “commercially available,” manufacturers can arguably fully comply with the HAC rules even if they first become ready to accept purchase orders and commence production on

what they previously believed would be non-compliant handsets. As Cingular explained, “a number of vendors with U1- or U2-rated handsets might not yet have tested or obtained TCB certification of the U-rating due to the expectation that such handsets would not meet the U3 standard for compliance purposes. Thus, additional U1- or U2-rated handsets ... may be forthcoming.” Cingular Waiver Request at n.2.

[10/](#) SunCom does not commence the testing process until the FCC authorization is issued in order to avoid the potential that some component of the handset may be altered prior to certification, thereby requiring a new round of network compatibility testing. A portion of the time incurred at this stage is sometimes attributable to waiting for the completion of the certification process.

[11/](#) See Samsung Waiver Request at 6 (“manufacturers do not mass produce ... handsets for a carrier customer until such time as they have received a purchase order”).

September 16, 2005. At that point, however, carriers are likely still months away from being able to offer the handsets to subscribers, depending primarily on how quickly the manufacturer can produce and ship the units.

To introduce new HAC-compliant handsets, SunCom believes that it can greatly expedite those portions of the deployment schedule which it controls. ^{12/} However, SunCom has no confidence that the stages dependent on the manufacturer will necessarily be faster than normal, given that the few HAC-compliant handsets will likely be in high demand initially, including by the Tier I carriers. Unlike the nationwide carriers, a smaller regional carrier such as SunCom has no bargaining leverage with the manufacturers. SunCom has 965,000 subscribers compared to 19 million for T-Mobile and 49 million for Cingular. Yet, even with their bargaining strength, both T-Mobile and Cingular have been forced seek waivers of the HAC rules for additional time. ^{13/} If even the manufacturers' top customers cannot obtain the inventory they need in time to comply, there can be no realistic expectations for the smaller carriers to do so.

The Commission has previously recognized the difficulties faced by smaller carriers in obtaining new FCC-mandated technologies from manufacturers in a timely manner. In the E-911 proceeding, the Commission "conclude[d] that handset vendors and network-based location technology vendors give priority to the larger, nationwide carriers," which created delays in the non-nationwide carriers receiving the equipment they needed to comply with the E-911 Phase II rules. ^{14/}

^{12/} For example, once its vendors have informed SunCom which, if any, HAC-compliant handsets are available, SunCom should be able to make an internal selection within 7 - 10 days. SunCom should also be able to expedite network compatibility testing. To the extent manufacturers make available HAC-compliant versions of existing handset models currently supported by SunCom (e.g., the Nokia 6102), little or no testing may be required.

^{13/} See Cingular Waiver Request; *see also* T-Mobile USA, Inc., Petition for Waiver of Section 20.19(c)(3) of the Commission's Rules, WT Docket No. 01-309 (filed Aug. 26, 2005). Moreover, while Cingular believed it would be able to have handsets in place by September 16 that satisfy the U3 rating in the 1900 MHz band, Cingular's belief was conditioned on vendors having "timely obtained all necessary TCB approvals." Cingular Waiver Request at 30. It is not yet known if this has occurred.

^{14/} *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order to Stay, 17 FCC Rcd 14841 (2002) ("E911 Stay Order") at ¶ 11.

The Commission noted carriers' comments that they were "unable to focus vendors altogether on the individual needs of their respective networks, particularly in light of the vendors' principal focus on filling orders from nationwide carriers," and that smaller markets "are at the 'end of the line' for product distribution." ^{15/} As a result, the Commission granted a temporary stay of the rules for these carriers.

Likewise, there is no reason to expect that handset manufacturers, some of which have just received equipment authorizations in the past days and weeks for handsets rated at U3 in the PCS band, will be inclined to ship product to SunCom prior to satisfying the needs of their Tier I customers. Indeed, some HAC-compliant handsets that are made "commercially available" by a manufacturer to certain carriers (thereby arguably fulfilling the manufacturer's HAC obligation) may simply not be available to SunCom. ^{16/} For example, SunCom has already discovered that two handset models – both publicly identified by the manufacturer as having a M3 or M4 rating for the PCS band and currently being offered – are not on the list of "available" handsets provided by the manufacturer's distributor, from whom SunCom must purchase handsets. ^{17/} SunCom has requested that the distributor contact the manufacturer to see if and when these models will ever be made available to SunCom.

Also not unlike the experience of smaller carriers in the E-911 situation, SunCom has found it surprisingly difficult to obtain information from vendors regarding the expected availability dates of HAC-compliant handsets. SunCom currently carries handsets from 10 different manufacturers, including the majority of the "leading" manufacturers. ^{18/} SunCom has repeatedly

^{15/} *Id.* at ¶ 12.

^{16/} It is not uncommon for manufacturers to provide one of the Tier I carriers with exclusive rights to sell a given handset for a certain period of time.

^{17/} As Dobson has already noted in this proceeding, some manufacturers require smaller carriers to purchase handsets through third-party vendors instead of directly from the manufacturer. *See* Dobson Waiver Request at 6.

^{18/} SunCom carries handsets from Sony Ericsson, Motorola, Nokia, LG, Research in Motion, Sagem, Audiovox, Palm, Firefly and Danger.

contacted all of its manufacturers (or their distributors) subject to the HAC rules [19/](#), as well as one manufacturer whose handsets SunCom does not currently offer. [20/](#) In contacts with vendors earlier in the year, SunCom inquired about the availability of HAC-compliant handsets and was generally told that a solution was still being developed. More recently, shortly prior to the release of the *GSM Waiver Order*, SunCom repeated its inquiries to its vendors, who either: (1) did not respond to SunCom's inquiries; (2) indicated that they were working to make particular models HAC-compliant, but that no equipment authorizations had been obtained and no estimated availability dates were available; or (3) indicated, via a statement from in-house counsel, that the company offered no HAC-compliant models.

As noted earlier, since the release of the *GSM Waiver Order* late last week, SunCom has re-contacted its vendors, but is still waiting for responses from several of them. SunCom has learned that one of the models it currently carries, the Nokia 6102, has been upgraded to include HAC compliance. This revised model, the 6102(h), received equipment certification only last Friday, September 9, 2005. SunCom has expressed its interest in this handset to Nokia and is waiting to learn how quickly Nokia would be able to produce and ship units to SunCom. Because the 6102 is already supported on its network, SunCom believes it could avoid the normal compatibility testing period and deploy this handset expeditiously, depending, of course, on Nokia's production schedule. Even if the Nokia 6102 can be produced in the relatively near term, SunCom must still locate a second handset in order to comply with the rules. Thus far, SunCom has learned that one other manufacturer expects to have compliant handsets available "early next year," and another expects to have an announcement about handset availability soon.

[19/](#) Handset models carried by SunCom include those of four manufacturers which SunCom understands produce two or fewer GSM handsets and therefore fall within the *de minimis* exception to the HAC rules. See 47 C.F.R. § 20.19(e)(1).

[20/](#) Under the *HAC Order*, carriers are not obligated to engage new equipment vendors for the purpose of complying with the HAC rules. See *HAC Order* at ¶ 69 (imposing no requirement that a carrier seek out other vendors where the carrier deals only with manufacturers subject to the *de minimis* exception); see also 47 C.F.R. § 20.19(e)(1)(A).

II. SunCom's Request for Relief Satisfies the Commission's Waiver Standard

It is clear that it will be physically impossible for SunCom to comply with the HAC rules by September 16, 2005. SunCom cannot offer compliant handsets to its customers if vendors cannot or will not make such handsets available to SunCom. Therefore, SunCom requests a waiver of Section 20.19(c)(2)(i) such that, for each of the two HAC-compliant handsets SunCom is required to offer its customers, SunCom will have 60 days beyond the date on which a manufacturer commences production of handset units for SunCom, assuming that the actual production time does not exceed the typical six week production period. In the intervening time, SunCom pledges to use best efforts to locate one or more manufacturers ready and willing to accept an order from SunCom and to commence handset production immediately thereafter. Specifically, SunCom will continue to contact its vendors, in writing, to inquire about the availability of compliant handsets. These contacts will continue to be made frequently, at least once per month per manufacturer, until compliant, ready-to-produce handsets are located. SunCom will describe its efforts in detail to the Commission in its regular HAC compliance reports, or more frequently as the Commission requests. ^{21/}

In the event the Commission declines to grant the relief requested above, SunCom requests, in the alternative, that it be granted a waiver of 120 days from September 16, 2005 to come into compliance with Section 20.19(c)(2)(i). SunCom of course cannot guarantee that handsets will be available from vendors within that timeframe, and SunCom cannot rule out the possibility that it may have to return to the Commission for additional relief in the future, given that SunCom has no control or influence over the manufacturers.

Under the Commission's rules, parties requesting waivers must show that: (i) the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and grant of the waiver would be in the public interest; *or* (ii) in view of the unique or

^{21/} In its regular HAC compliance reports, SunCom will also describe the status of its efforts to offer dual-band GSM handsets that achieve a rating of U3 or higher in the 850 MHz band, as required by the *GSM Waiver Order*.

unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the entity requesting the waiver has no reasonable alternative. ^{22/} SunCom's request satisfies both prongs of this standard.

First, it would be in the public interest to provide SunCom with the additional time requested, as requiring SunCom to comply more quickly could force SunCom to limit its HAC-compliant handset offering to single-band phones, which may be more readily available than dual-mode phones. This would undermine the purpose of the rule, as it would not provide hearing aid users with the same level of wireless service available to non-hearing impaired customers.

Second, application of the rule in the current circumstances would be inequitable and unduly burdensome, given that the availability of HAC-compliant dual-band GSM handsets is beyond SunCom's control. The Commission has traditionally granted relief to carriers in circumstances such as this, where carriers are unable to comply with a given regulation without access to particular equipment from third party vendors. ^{23/} Moreover, relief is especially justified here, where equipment manufacturers were not required to make compliant handsets "commercially available" – which may not require the actual production of *any* handsets under some interpretations ^{24/} – until September 16, and thus carriers were forced into the position of having to "instantaneously" provide handsets to its customers on the same date.

As events unfolded, the Commission's expectations regarding the ease (and speed) with which GSM handsets could be designed to conform to the U3 rating did not come to pass. In situations such as this, where the Commission's earlier predictions and expectations were not met by

^{22/} See 47 C.F.R. §§ 1.3, 1.925. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

^{23/} See, e.g., *E911 Stay Order; Telephone Number Portability, Petitions for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase II*, 13 FCC Rcd 9564 (1998) at ¶¶ 18, 25; *Roosevelt Country Rural Tel. Cooperative, Inc.*, 13 FCC Rcd 22 (1997) at ¶¶ 28-36; *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 – Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd 1981 (1994) at ¶¶ 76-77.

^{24/} See Samsung Waiver Request at 6.

the industry, the D.C. Circuit has held that the Commission has an obligation to monitor and “fine tune” its regulatory approach as new information comes to light, in order to satisfy its “continuing obligation to practice reasoned decisionmaking.” [25/](#) The Commission should do so here by granting the instant waiver request.

CONCLUSION

To the best of SunCom’s knowledge, no HAC-compliant, dual-band GSM handsets are currently “commercially available” to SunCom, under any reasonable definition of that term. To date, not a single one of SunCom’s handset vendors has been able to provide a firm estimate of when it could ship HAC-compliant handsets to SunCom if an order were placed today (assuming the vendor would even accept an order from SunCom at this time). The most definitive availability estimate received so far is “early next year.” Therefore, SunCom requests a waiver that will provide it the necessary additional time needed to come into compliance with Section 20.19(c)(2)(i).

Respectfully submitted,

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[25/](#) See *Telocator Network of America v. FCC*, 692 F.2d 525, 550 n.191 (D.C. Cir. 1982) (“Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience” and “a duty to fine-tune its regulatory approach as more information becomes available”); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (“should the Commission’s predictions ... prove erroneous, the Commission will need to reconsider its allocation in accordance with its continuing obligation to practice reasoned decisionmaking”).